

# New Hampshire Commission for Human Rights



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v.

Total Restoration, Inc. and Kris Kile

ER(R) 6129-97  
16D970635

## DECISION OF THE COMMISSION

The charging party filed this claim on September 8, 1997, alleging that her former employer discriminated against her on the basis of religion and retaliated against her. Investigating Commissioner Coughlin having found probable cause to credit the allegations in the charge, and conciliation having failed, a public hearing was conducted on August 2 and September 6, 1999, before Commissioners Hesse, Hubal, and Manning.

The following witnesses testified on behalf of the charging party: Susan Cooper (claimant); Kara Fisher, an employee of respondent; Len Cooper, claimant's husband. Respondent called the following witnesses: George Dana, an employee of respondent; Jason Donna, an employee; Dan Tocchini, corporate consultant and founder of Mashiyach Ministries; Kim Moran, respondent's office manager; Charlie W. Griffin, business consultant and CPA; Katie Kile, respondent Kris Kile's wife; respondent Kris Kile, owner of Total Restoration, Inc.

In deliberations on September 6 and October 5, 1999, the Commissioners found and ruled as follows.

### I. Background

Total Restoration, Inc., of Amherst, NH, is a business owned and operated by Kris Kile. Originally a sole proprietorship, the company was incorporated in May 1990, with Kris Kile the sole shareholder. The business involves the restoration of property damaged by flood and fire. Sales contacts with insurance companies, cleaning, and construction, are the main activities conducted by the business.

Kris Kile, president of respondent, hired the complaining party, Susan Cooper, in the fall of 1995 to work part time. In

August 1996, Kile promoted complainant to full time work in the areas of marketing, human resources, and franchising.

At some point in the winter of 1996, Kile indicated to complainant that he wanted her to participate in a "Momentum" training program. Complainant believed at that time that it was a self-help program. She did not want to attend but did not say so to Kile. Momentum training is in actuality a Christian, action-oriented education program run by Mashiyach Ministries, Inc. Its statement of purpose describes Momentum as an opportunity for participants to "discover and realign the belief systems that govern your life, such that you experience a transformation in your ability to love others as Christ loves you, liberating your conscience to fulfill God's unique purposes for you with freedom, passion, and power."

During this time, complainant and her husband were having marital problems, which were apparent to Kile and to complainant's co-workers. Complainant voluntarily shared information with co-workers and Kile regarding her personal problems, and was often in tears at work. In connection with the development of a plan to franchise his business, Kile had assigned to complainant the job of developing a policies and procedures manual. Kile felt that complainant's personal problems were affecting her ability to work.

In January 1997, Kile approached the complainant and suggested that she and her husband attend a "One Accord" marital workshop in February. Complainant did not express her unwillingness to attend. Rather, she said she could not go because her husband did not want to. On January 27, 1997, Kile sent complainant and her husband a letter confirming their registration for the February 14-16 One Accord Workshop. When complainant and her husband did not attend, Kile put complainant and her husband on the waiting list for a March "Momentum" workshop.

During this same time period, Kile instructed complainant to work with an independent consultant, Dan Tocchini, regarding the development of the policies and procedures manual. In January 1997, complainant had begun regular telephone conferences with Tocchini, who at that time lived in Hawaii. Complainant never expressed to Kile that she did not want to talk to Tocchini.

Complainant and Tocchini engaged in approximately fourteen such telephone calls between January 8, 1997, the date of the first call, and June 13, 1997, the last one. After many calls, complainant eventually learned that Tocchini was a minister and founder of Mashiyach Ministries, Inc. Tocchini had begun to use a part of each telephone call to talk with complainant about her marital problems. Complainant's husband participated in some of the later calls. Complainant became uncomfortable with these

calls, however Kile told her that Tocchini was helping him and his wife in their marriage and that it would do her good. Kile also told complainant that Total Restoration would pay the cost of the "counseling," in lieu of a raise for complainant.

The calls were increasingly upsetting to complainant. Another employee (Fisher) witnessed complainant coming out of her office "a wreck and crying" after her calls with Tocchini. Complainant tried to avoid the calls when Kile was out of the office because she did not want to talk about her personal life.

Complainant and her husband attended the March Momentum training, a 4-day workshop running from Thursday through Sunday. Although neither of the Coopers wanted to attend, Susan Cooper went because her employer appeared to want her to go, and Len Cooper, who had talked personally with Kile about the situation, went in order to support his wife and because Kile told him that it would help both Coopers in their work and relationships.

Prior to attending, the Coopers were required to fill out forms for the program and return them to Kile, the program's host. The forms require disclosure of personal information regarding medical conditions, medications, treatment history, and disabilities, among other things.

The Coopers realized how religious the program was when they arrived at the conference site for the Momentum training. Religious music, posters, and prayers were utilized throughout the weekend. The training method was intensely personal and confrontational, a style upsetting to both Coopers. At the end of the program, the Ministries conducted a "free will offering" session, at which the Coopers reluctantly gave \$500.00, in spite of their strained financial situation.

Following this training, Kris Kile informed complainant that he wanted her to become a "trainer" for the next Momentum training. Complainant felt pressured to attend but did not want to participate, because the team members in the March training were "strange" and because training would take her out of work. Kile assured complainant that he would pay her for the days she missed from work, and complainant agreed to be a trainer.

Complainant came home in tears from the first training session, April 20, 1997. Complainant, who was an Episcopalian, had learned that many of those participating in the program had been together in a prior religious community in another state. Complainant began to feel that Momentum was a cult. When her husband told her not to go back, complainant explained that she was afraid to lose her job and that she felt she had no choice.

As a "trainer" complainant was asked to target other employees of respondent for possible participation in Momentum

training. Kile checked frequently to see if complainant was having success in this endeavor. This made complainant uncomfortable.

Complainant attended organizational meetings at the Kiles' home for the training to take place in June. In May, Kile promoted complainant to vice-president, to be in charge when he was out of the office. Prior to the May 29th training session, complainant called Kile and told him she did not want to continue to participate in Momentum. Kile informed complainant that she had committed and needed to keep that commitment. He reminded her why she had originally signed up. He told her to come to the meeting and they "would talk."

Complainant did attend the May 29 meeting, but the next day informed Kile again that she did not want to continue. Kile again pressured complainant to remain involved. Complainant attended two additional training programs, although making excuses about why she could not recruit other employees.

Complainant had continued to talk to Tocchini and to discuss, reluctantly, her personal life with him. Around this time complainant learned that although Tocchini assured her that their relationship was a "counseling" one, he had shared personal information about complainant with Kile. Complainant was devastated by this.

The Momentum training was scheduled to start June 19, 1997. The previous evening complainant attended the set-up for the session. She was in charge of religious posters. She then attended June 19 and 20. On Saturday, June 21, however, complainant called Kile and told him she could not come, because of a problem with her children.

On Monday, June 23, Kile informed complainant that her dropping off the training team would not affect her job. That afternoon, however, Kile informed complainant that her duties would be changed to marketing only, and therefore she would no longer need or use the title of vice-president.

Kile began to treat complainant differently at work: constantly checking her work and questioning her about tasks in a way he had never done before, when he had trusted her to be in charge when he was out of the office.

On July 25, respondent terminated complainant. Kile explained that he was terminating her for financial reasons. Respondent offered complainant four weeks' severance pay and payment for one month's medical insurance continuation coverage. After learning that complainant had been exploring the possibility of employment with one of respondent's competitors before her termination, Kile withdrew the offer of severance and

threatened to sue complainant and the competitor (Lamb) if, as a result of complainant's employment, trade secrets or other proprietary information such as customer lists were divulged to Lamb. Respondent only paid complainant one week's severance.

## II. Legal Standards

RSA 354-A:7,I provides that it shall be an unlawful discriminatory practice for any employer, because of the religious beliefs of any individual, to discharge any employee, or to discriminate against any individual in compensation or in terms, conditions or privileges of employment.

Religion includes "all aspects of religious observance and practice, as well as belief." 42 U.S.C. §2000e(j). Title VII has been interpreted to protect against requirements of religious conformity and as such protects those who refuse to hold, as well as those who hold, specific religious beliefs. See: International Ass'n of Machinists & Aerospace Workers v. Boeing Co., 833 F.2d 165 (9th Cir. 1987).

A. To establish a prima facie case, an employee who claims she was discriminated against because she did not participate in religious activities supported by her employer, must show: (a) that she was subjected to some adverse employment action; (b) that, at the time the employment action was taken, the employee's job performance was satisfactory; and (c) some additional evidence to support the inference that the employment actions were taken because of a discriminatory motive based upon the employee's failure to hold or follow her employer's religious beliefs. See: Shapolia v. Los Alamos National Lab., 992 F.2d 1033, 61 FEP Cases 1172 (10th Cir. 1993). If the evidence supports the complainant's prima facie case, then the respondent must articulate non-discriminatory reasons for its decision(s) affecting complainant. The complainant must ultimately prove that the non-discriminatory reasons offered by the respondent are a pretext for religious discrimination.

B. RSA 354-A, like Title VII of the Civil Rights Act of 1964, also protects workers from a work environment abusive to employees because of their religion. See: Harris v. Forklift Systems, Inc., 114 S.Ct. 367, 371 (1993). To be actionable, harassment must sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986).

Whether or not the complainant's work environment may be considered "hostile" depends on the totality of the circumstances. Factors pertinent to this analysis include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive

utterance; and whether it unreasonably interferes with an employee's work performance.

When harassment by a supervisor results in tangible employment action, the employer is liable. When harassment by a supervisor does not result in a tangible employment action, an employer will be liable unless it can prove that it took reasonable care to prevent and correct any harassment, and can show that the employee unreasonably failed to take advantage of any corrective measures an employer has established to remedy harassment. See: Burlington Industries, Inc. v. Ellerth, 118 S.Ct 2257 (1998) and Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998).

C. It is an illegal discriminatory practice for any person engaged in an activity to which RSA 354-A applies to discharge, expel or otherwise retaliate or discriminate against any person because the person has opposed any practices forbidden under the chapter or because the person has filed a complaint, testified or assisted in any proceeding under the chapter. RSA 354-A:19

In order to establish a case of retaliation on these facts, complainant must show that she opposed a practice forbidden under the statute, that her employer was aware that she was opposing a practice forbidden under the statute, and that as a result, her employer took some action against her.

### III. Analysis

Based upon the preponderance of the evidence, the Commission found that respondent created a hostile work environment for complainant by pressuring her to participate in religious training which she found repugnant. The period of harassment ran from approximately May 29, when complainant informed respondent that she did not want to participate in Momentus any longer, through complainant's termination. By May, a reasonable person in Kile's position would have known that complainant did not desire or enjoy participation in Kile's religious activities.

The Commission found that Kile's close scrutiny of complainant's performance after she ceased participating in the Momentus training, was based only on complainant's refusal to participate further. No evidence of poor performance by complainant was submitted. The Commission also found that Kile's removal of complainant's title of vice-president was punitive, since it achieved nothing and was not accompanied by a reduction in salary. No evidence was offered to show what, if anything, happened between June 21, when complainant informed Kile that she was no longer participating in Momentus, and June 23, when Kile removed complainant's title, which could explain the need for this action by Kile.

Although complainant asserts that the entire six months' of activity by her employer between January and June 1997 was repugnant to her, the Commission is not able to agree that the period of harassment was that long. Complainant testified she did not know One Accord or Momentus were religious at the time Kile originally asked her to attend them. She also told Fisher that the first Momentus training was "OK" and had "helped a little" although it was "different." Therefore, based on the totality of the circumstances, the Commission is unable to find that the activities prior to May created a hostile work environment for which respondent is liable.

While the Commission makes no comment on the value or professionalism of Tocchini's consulting and counseling work with complainant and her husband, the evidence supports a finding that at first neither complainant nor her husband was aware of Tocchini's involvement in the ministry. Although the personal discussion during the calls was offensive to complainant, it was not because of religion.

The Commission did not find that respondent terminated complainant's employment on July 25, 1997 because of her refusal to participate in Momentus any longer. The respondent submitted credible documentary evidence and witness testimony that its financial status was not good in 1997, and that on July 22, Kile received the May and June financial statements. The company had been losing money before that and Kile had been lending the company money, but the May and June statements showed a more serious situation, requiring action. Cross-examination of respondent's witnesses on this issue did not establish the pretextual nature of respondent's business reasons.

Frank McGurk, who had worked previously for the respondent as a carpenter and for another company as site supervisor, had been offered a job in the spring of 1997 to come back to respondent as project manager and estimator, long before complainant quit Momentus. Because of the financial situation in July, Kile had to cut an employee and decided that he had no choice but to let complainant go. McGurk was brought back because of his direct value to the company; Kile himself could handle sales once complainant was gone. The evidence was clear that complainant's role in respondent's franchising efforts was at an end because that effort was a total failure. The evidence was simply insufficient to show that respondent's business reason for letting complainant go was a pretext for discrimination. Regardless of complainant's non-participation in Momentus, the Commission believed that the evidence showed respondent would have let complainant go.

The evidence is also insufficient to establish retaliation. Because there is no evidence that complainant ever informed respondent that she believed he was discriminating against her by

pressuring her to participate in Momentum, complainant has not established the necessary "opposition" element of her case. In fact, when complainant declined to participate any longer, she gave as the reason that her children had been burned in the bathtub and needed her. The evidence showed that other employees had declined to become involved in Kile's religious activities, or had quit after initial involvement, without being terminated by Kile.

Kile's handling of the Lamb matter was undiplomatic and was probably an over-reaction, given the facts of the situation. However, Kile had offered four weeks' severance on July 23 when he terminated complainant, and only withdrew the offer after learning that complainant was negotiating with a competitor, without his knowledge, while still employed by him. Thus, the Commission was unable to find that this action by Kile was motivated by religious bias.

#### IV. Conclusion

The respondent created a hostile work environment for complainant by pressuring her to participate in religious activities which were unwelcome and offensive to her from May 1997 until June 21, 1997. Respondent responded in a hostile manner when complainant dropped out of the Momentum training, by scrutinizing her work unnecessarily from June 21 until her termination on July 25, and by removing her title of vice-president on June 23, although not reducing her salary.

Accordingly the Commission found that respondents Total Restoration, Inc. and Kris Kile discriminated against Susan Cooper based on religion.

The respondent has articulated a legitimate, non-discriminatory reason for terminating the complainant's employment. The Commission found, based upon all the evidence, that complainant has not shown that the respondent's reason was a pretext for discrimination. The Commission did not find that the respondents violated RSA 354-A:19, Retaliation.

#### V. Award of Damages

Having determined that the respondent has engaged in an unlawful practice, the Commission is authorized to order the respondent to pay damages to the complainant. RSA 354-A:21,II(d); E.D. Swett, Inc. v. New Hampshire Commission for Human Rights and Leonard Briscoe, 124 N.H. 404 (1983).

##### A. Compensatory Damages

The Commission found that Susan Cooper suffered emotional harm, distress, and embarrassment as the result of unlawful

discrimination by Total Restoration, Inc. and Kris Kile. She and her husband testified to her discomfort with the religious activities she observed and participated in as a Momentum trainer, as well as the pressure from Kile to recruit her co-workers to a religious activity she did not believe in. Accordingly, the Commission orders the respondent to pay the sum of \$6,000 to compensate the complainant for emotional harm.

**B. Attorney's Fees and Costs**

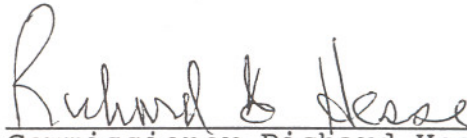
The Commission orders the respondent to pay complainant's reasonable and necessary attorney's fees and costs incurred in connection with the harassment portion of her claim. Complainant's counsel is ordered to submit a detailed, itemized statement of fees and costs within 20 days of service of this order. Respondent is granted 10 days from the filing of the statement to object. The commission will then enter a final order.

**C. Total Damages**

Respondent is ordered to pay complainant the sum of \$6,000 plus interest, to compensate her for emotional harm. Respondent shall pay complainant's reasonable attorney's fees and costs on the harassment claim.

So Ordered.

11/24/99  
Date

  
Commissioner Richard Hesse, Esq.  
Chair for the Hearing Commissioners

Commissioner Evelyn Hubal  
Commissioner Maureen R. Manning, Esq.

**RULINGS ON REQUESTS FOR FINDINGS OF FACT AND RULINGS  
OF LAW SUBMITTED BY COMPLAINANT**

1. Granted
2. Irrelevant, therefore no ruling
3. Granted, with "In about December" deleted
4. Granted, with "In the same time frame" deleted
5. Granted
6. Granted
7. Granted
8. Granted as to (a) through (d); 8(e) denied
9. Granted
10. Granted
11. Granted as to (a) through (f); (g) and (h) denied; (i) and (j) granted

12. Granted
13. Granted
14. Granted
15. Granted
16. Granted
17. Granted
18. Omitted
19. (a) irrelevant  
(b) and (c) Granted
20. (a) through (e) Granted  
(f) Denied  
(g) through (n) Granted
21. (a) through (c) Granted, but delete word "strange" in (c)
22. Denied
23. Granted
24. Granted
25. Granted
26. Granted, but substitute "Len" for "he"
27. Granted
28. Denied
29. Granted
29. Granted
30. Omitted
31. Denied
32. Omitted
33. Granted
34. Granted
35. Denied
36. Granted, but delete word "each" and replace it with "some,"  
and delete "but mostly" and replace with "and"
37. Granted
38. Granted, but delete "daily"
39. Granted as follows: "Kile's inquiries about complainant's  
marriage upset her." Delete request as written.
40. Granted
41. Granted
42. Granted
43. Omitted (doesn't exist)
44. Granted
45. Granted
46. Denied
47. Granted
48. Granted, but delete "March 13-16"
49. Granted
50. Granted
51. Granted
52. Granted
53. Granted
54. Denied
55. Granted
56. Granted, but delete "from 2-5:00"
57. Granted

58. Denied, irrelevant  
59. Granted, but delete "In May"  
60. Granted  
61. Granted  
62. Granted  
63. Granted  
64. Granted  
65. Granted, but delete "from 1-5" and delete entire last sentence.  
66. Granted  
67. Granted  
68. Granted  
69. Granted  
70. Denied, irrelevant  
71. Denied, irrelevant  
72. Denied, irrelevant  
73. Denied, irrelevant  
74. Granted  
75. Granted, but insert period after "job" and delete rest of sentence.  
76. Granted  
77. Granted, but delete "and Kile negotiated the purchase of condo units, without discussion, even though his cash flow was very poor at the time."  
78. Granted  
79. Omitted  
80. Denied  
81. Granted  
82. Granted  
83. Granted  
84. Granted, but delete "tossed some papers at" and insert "gave some papers to"  
85. Denied  
86. Granted, but insert period after "one extra payroll" and delete rest.  
87. Granted, but delete "plus a company car" and "three other"  
88. Granted  
89. Denied  
90. Denied  
91. Granted, as to first sentence only. Remainder denied.  
92. Granted  
93. Granted  
94. Granted  
95. Granted, but delete second sentence.  
96. Granted  
97. Granted  
98. Granted  
99. Granted  
100 through 102. Omitted  
103. Granted  
104. Granted  
105. Granted

106. (a) Granted, although complainant contributed to hostility.  
(b) Granted, as to timing of decision to remove title of vice-president only.  
(c) Granted, as to decision to remove title only.  
(d) Denied  
(e) Denied  
(f) Denied

CONCLUSIONS OF LAW

- 1-a. Granted  
1-b. Granted  
1-c. Granted  
1-d. Denied  
2. Granted  
3-a. Denied as written; see legal standard in Decision.  
3-b. Granted  
3-c. Granted  
3-d. Granted, but delete "and supportive of complainant's allegations."  
4. Denied.  
5-a. Granted  
5-b. Granted  
5-c. Granted  
5-d. Granted  
5-e. Denied. No evidence that complainant believed she was refusing "religious practices" in December, February.  
6-a. Granted  
6-b. Granted  
6-c. Neither granted nor denied.  
7. Granted  
8. Granted  
9. Granted  
10. Granted  
11. Granted  
12. Neither granted nor denied.  
13. Commission does not make an award enhanced compensatory damages or lost pay and benefits.  
14. Granted  
15. Granted  
16. Granted  
17. Granted as to (b), (c), (d). (a) and (e) denied.  
18. Granted  
19. Denied

RESPONDENT DID NOT TIMELY SUBMIT REQUESTS FOR FINDINGS AND RULINGS